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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11 **JOSHUA ASSIFF,**

12 **Plaintiff,**

13 **v.**

14 **COUNTY OF LOS ANGELES;**
15 **SHERIFF DEPUTY BADGE**
16 **NUMBER 404532;**
17 **And DOES 1 through 10,**

18 **Defendants.**

Case No. 2:22-cv-05367 RGK (MAAx)

**PLAINTIFF'S MOTION IN LIMINE
NO. 2 TO EXCLUDE OR LIMIT
EXPERT TESTIMONY OF
DEFENDANT'S EXPERT MICHAEL
GRAY; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT**

Action Filed: August 3, 2022
Pretrial Conference: July 10, 2023
Trial Date: July 25, 2023

Assigned to: Hon. R. Gary Klausner,
District Judge, Courtroom 850

22 TO THE COURT, ALL PARTIES IN THIS ACTION, AND TO THEIR
23 RESPECTIVE ATTORNEYS OF RECORD:

24 PLEASE TAKE NOTICE THAT Plaintiff, JOSHUA ASSIFF (hereinafter
25 "Plaintiff") hereby move this Court for an order in limine to exclude or limit evidence,
26 references, argument and testimony from Defendants' police practices expert,
27 Michael Gray.
28

1 Plaintiff bring this Motion on the grounds that this evidence is irrelevant,
2 without proper foundation under FRE 702, and unfairly prejudicial, confusing and/or
3 a waste of time. Therefore, it is inadmissible and should be excluded pursuant to
4 Federal Rules of Evidence §§ 402, 403 and 404. Any attempt to convey this
5 information to the jury would be highly improper and unfairly prejudicial to Plaintiff,
6 even if the court were to sustain an objection and instruct the jury to not consider
7 these facts. Thus, this motion seeks a ruling in advance.

8 Plaintiff further move this Court to instruct Defenadts and their counsel and to
9 require them to advise all witnesses:

10 1. Not to attempt to convey to the jury, directly or indirectly, any of the
11 facts mentioned in this Motion without first obtaining permission of the Court outside
12 the presence and hearing of the jury;

13 2. Not to make any reference to the fact that this Motion has been filed;
14 and

15 3. To warn and caution each of plaintiffs' witnesses to strictly follow the
16 same instructions.

17 This motion is made following compliance with the meet and confer
18 requirements of Local Rule 7-3. This Motion is based upon the attached
19 Memorandum of Points and Authorities, the Declaration of Thomas M. Ferlauto,
20 served herewith, upon the pleadings and papers on file herein, and upon such other
21 and further oral argument and evidence as may be presented at the hearing on this
22 Motion.

23
24 DATED: June 12, 2022

The Law Office Of Thomas M. Ferlauto, APC

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26 By: _____

Thomas M. Ferlauto

27 Attorney For: Plaintiff, JOSHUA ASSIFF
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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff, JOSHUA ASSIFF (hereinafter “Plaintiff”) hereby respectfully submits the following memorandum of points and authorities in support of his motion in limine to limit evidence, references, argument and testimony from Defendants’ police practices expert, Michael Gray.

I. INTRODUCTION

Plaintiff is a 21-year old black male and a student at Antelope Valley College where he plays basketball. Plaintiff was driving from his home to a teammate’s house in order to carpool to basketball practice. For no apparent reason and without probable cause, KELLY, a male Caucasian motorcycle Sheriff deputy, pulled Plaintiff over. For no apparent reason and without probable cause, KELLY – as well as other deputies who subsequently responded to the call – all tasered, choked, pepper sprayed, beat and arrested Plaintiff. Plaintiff has asserted two causes of action – the First Cause of Action against KELLY for violation of 42 USC § 1983 (arrest without probable cause and with excessive force), and the Second Cause of Action against COUNTY OF LOS ANGELES for violation of 42 USC § 1983 (Monell liability).

On May 10, Defendant served their expert witness disclosure that contained the report of Michael Gray. Unlike Plaintiff expert who properly limited his opinions to matters of generally accepted police practices, Defendants’ expert opines on improper matter that form the ultimate legal issues presented by this case such as:

1) Whether Defendant Kelly had “probable cause” to arrest Plaintiff (**Exhibit 3**, p.11, ¶ 4.b.)

2) Whether Defendant Kelly used “excessive force” to arrest Plaintiff (**Exhibit 3**, p. 11, ¶ 4.d.)

3) Whether customs or policies promulgated, maintained, or enforced by the LASD caused Plaintiff’s harm (**Exhibit 3**, p. 11, ¶ 4.e.)

4) Whether an LASD custom or practice violated the civil rights of its citizens. (**Exhibit 3**, p. 12, ¶ 4.g.)

**II. THE COURT CAN GRANT THE RELIEF REQUESTED BY THIS
MOTION**

A motion in *limine* “is any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *Luce v. United States* (1984) 469 U.S. 38, 40. Motions in *limine* are well recognized in practice and by case law. See *Ohler v. United States* (2000) 529 U.S. 753, 758; *United States v. Cook* (9th Cir. 1979) 608 F.2d 1175, 1186. The purpose is to avoid the futile attempt of “unring[ing] the bell” when jurors have seen or heard inadmissible evidence, even when stricken from the record. See *Brodit v. Cambra* (9th Cir.2003) 350 F.3d 985, 1004-05 (citing *Kelly v. New West Fed. Sav.* (1996) 49 Cal. App. 4th 659, 669). Motions in *limine* also serve to streamline trials, by settling evidentiary disputes in advance. See *U.S. v. Tokash* (7th Cir. 2002) 282 F.3d 962, 968

III. LEGAL STANDARD FOR EXPERT TESTIMONY

The admissibility requirements of expert testimony are stringent, the party presenting the expert bears the burden of proving the admissibility of the expert’s opinions, and the Court has a duty to screen expert testimony “to ensure that the expert testimony both rests on reliable foundation and is relevant.” *Acad. of Motion Pictures Arts & Scis. v. GoDaddy.com, Inc.* (CD. Cal. June 21, 2013) 2013 WL 12122803, at *2 (emphasis added); *Daubert v. Merrell Dow Pharm., Inc.* (1993) 509 U.S. 579, 589-90 (“*Daubert I*”); *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 147; *Daubert v. Merrell Dow Pharma., Inc.* (1995) 43 F.3d 1311, 1315 (“*Daubert II*”); *see also* Fed. Rules Evid. 702.

Federal Rule of Evidence 702 (“Rule 702”) governs the admissibility of expert testimony stating, “A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.” Relevant expert

1 testimony “must be ‘tied to the facts’ of the case” and “assist the trier of fact to
2 understand the evidence or to determine a fact in issue.” Fed.R.Evid. 702; *Daubert I*,
3 509 U.S. at 591; *Cooper v. Brown* (9th Cir. 2007) 510 F.3d 870, 942 (emphasis added
4 and citing *Daubert II*, 43 F.3d at 1315.)

5 Legal conclusions (i.e., opinions on an ultimate issue of law) are *not* “helpful”
6 and therefore should be excluded. “Each courtroom comes equipped with a ‘legal
7 expert’ called a judge, and it is his or her province alone to instruct the jury on the
8 relevant legal standards.” [*Burkhart v. Washington Metropolitan Area Transit*
9 *Auth.* (DC Cir. 1997) 112 F3d 1207, 1213; *Nationwide Transport Finance v. Cass*
10 *Information Systems, Inc.* (9th Cir. 2008) 523 F3d 1051, 1058-1060] It is error to
11 permit an expert to testify in terms having specialized legal meaning distinct from
12 ordinary usage. [*Burkhart v. Washington Metropolitan Area Transit Auth.*, supra, 112
13 F3d at 1215; *Woods v. Lecureux* (6th Cir. 1997) 110 F3d 1215, 1219-1220—in 42
14 USC § 1983 civil rights action against prison warden, expert witness prohibited from
15 using term “deliberately indifferent” to describe defendant's conduct]

16 **IV. UNDISCLOSED OPINIONS SHOULD BE EXCLUDED**

17 Rule 26 governs discovery and the duty to disclose. Subsection (a)(2) governs
18 disclosure of expert testimony. It states that each party must disclose to the opposition
19 the identity of any expert witness. Fed.R.Civ.P. 26(a)(2)(A). That disclosure must be
20 accompanied by a written report containing: (1) a complete statement of all opinions
21 the witness will express and the basis and reasons for them; (2) the facts or data
22 considered by the witness in forming them; (3) any exhibits that will be used to
23 summarize or support them; (4) the witness's qualifications, including a list of all
24 publications authored in the previous 10 years; (5) a list of all other cases in which,
25 during the previous 4 years, the witness testified as an expert at trial or by deposition;
26 and (6) a statement of the compensation to be paid for the study and testimony in the
27 case. Fed.R.Civ.P. 26(a)(2)(B). Rule 37(c)(1) gives teeth to these requirements by
28 automatically excluding any evidence not properly disclosed under Rule 26(a),

1 irrespective of the party's bad faith or willfulness. *Yeti by Molly Ltd. v. Deckers*
2 *Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.2001).

3 **III. MEET AND CONFER**

4 On June 8, 2023, counsel for Plaintiff wrote to counsel for Defendant to request
5 to meet and conferred on the substance of this Motion in Limine. (**Exhibit 4**) Counsel
6 for Defendant never responded and no agreement could be reached.

7 **IV. CONCLUSION**

8 For the reasons set forth above, the testimony of Defendants' police expert
9 Michael Gray should be excluded or limited.

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11 DATED: June 12th, 2023

The Law Office Of Thomas M. Ferlauto, APC

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13
14 By: _____

15 Thomas M. Ferlauto

16 Attorney For: Plaintiff, JOSHUA ASSIFF
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